

IN THE UNITED STATES DISTRICT  
COURT EASTERN DISTRICT OF  
WISCONSIN

The ESTATE OF SYLVILLE K. SMITH, by	)	
Personal Representative Mildred Haynes,	)	No. 17-cv-862
Patrick Smith, and Mildred Haynes, on her	)	
own behalf,	)	
	)	
Plaintiffs,	)	JURY TRIAL DEMANDED
	)	
v.	)	
	)	
CITY OF MILWAUKEE, WISCONSIN	)	
and DOMINIQUE HEAGGAN-BROWN,	)	
	)	
Defendants.	)	

## **EXHIBIT 30**

Novack Criminal Trial Transcript

David B. Owens  
Danielle Hamilton  
LOEVY & LOEVY  
311 N. Aberdeen St, Third FL  
Chicago, IL 60607  
(312) 243-5900

STATE OF WISCONSIN      CIRCUIT COURT      MILWAUKEE COUNTY  
BRANCH 30

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 2016-CF-005562

DOMINIQUE L. HEAGGAN-BROWN,

Defendant.

**JURY TRIAL - AM**

**JUNE 15, 2017**

**HON. JEFFREY A. CONEN,**  
Circuit Court Judge,  
presiding.

LAURELL L. BRESLOW-COLLIEN, RPR  
Official Court Reporter

**CHARGES:**

Count 1: First-Degree Reckless Homicide

**A P P E A R A N C E S:**

JOHN T. CHISHOLM, District Attorney, and BENJAMIN LINDSAY, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

STEVEN R. KOHN and JONATHAN C. SMITH, Attorneys at Law, appeared on behalf of the Defendant.

DOMINIQUE L. HEAGGAN-BROWN, Defendant, was present in custody.

ALSO PRESENT: J. Michael Damarco, Investigator

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I N D E X

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SPECIAL AGENT JAY NOVAK	
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<u>E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID'D</u>	<u>RCV'D</u>
43	Body Camera Transcript .....	44 .....	--
71	Package of Photo Stills .....	38 .....	41
72	Package of Photo Stills .....	19 .....	20

1                    TRANSCRIPT OF PROCEEDINGS      (9:53 a.m.)

2                    THE CLERK:    Case No. 16-CF-5562, State  
3                    of Wisconsin vs. Dominique Heaggan-Brown,  
4                    first-degree reckless homicide.    Matter is here  
5                    for a jury trial.    Appearances.

6                    MR. CHISHOLM:    Good morning, Your  
7                    Honor.    John Chisholm and Ben Lindsay on behalf of  
8                    the State.

9                    MR. SMITH:    Good morning.    Attorneys  
10                   Jonathan Smith and Steven Kohn on behalf of  
11                   Mr. Heaggan-Brown.

12                   THE COURT:    All right.    Good morning.  
13                   Are we ready to go this morning?

14                   MR. CHISHOLM:    We are, Your Honor.

15                   THE COURT:    Defense?

16                   MR. SMITH:    Yes.

17                   THE COURT:    All right.    Next witness.

18                   MR. CHISHOLM:    The State's first  
19                   witness would be Special Agent Jay Novak.

20                   THE COURT:    Let's go off the record for  
21                   a second.

22                   (A discussion was held off the record.)

23                   THE BAILIFF:    All rise for the jury.

24                   (The jury entered the courtroom.)

25                   THE BAILIFF:    You may be seated.

1 THE COURT: All right. We're on the  
2 record. Good morning, ladies and gentlemen.  
3 We've readjusted some of the TV cameras for you  
4 guys so hopefully that will work for you. If you  
5 do have problems during the course of the trial,  
6 kind of get one of our attention and ask if we can  
7 kind of readjust a few things. We want to make  
8 sure that everyone can see everyone so that we  
9 don't run into a problem later on.

10 So some of the issues with regard to  
11 the video from yesterday, it is -- it's my  
12 understanding that at least parts of that, if not  
13 all of it, are going to be replayed during the  
14 course of the testimony of the next witness also  
15 so you'll have an opportunity to see it happen.

16 All right. Next witness.

17 MR. CHISHOLM: The State calls Special  
18 Agent Jay Novak.

19 THE COURT: Raise your right hand.

20 **SPECIAL AGENT JAY NOVAK**, called as a  
21 witness herein, being first duly sworn, was  
22 examined and testified as follows:

23 THE COURT: Have a seat, please.

24 THE WITNESS: Thank you.

25 THE COURT: Tell us your name; spell

1           your first and last name, please.

2                       THE WITNESS: Agent Jay, J-A-Y, Novak,  
3           N-O-V-A-K.

4                       THE COURT: You may proceed.

5                       MR. CHISHOLM: Thank you, Your Honor.

6                               **DIRECT EXAMINATION**

7       BY MR. CHISHOLM:

8       Q       Good morning, Agent Novak. How are you?

9       A       Good morning, sir. Good.

10      Q       How long have you worked with the Division of  
11              Criminal Investigation with the Department of  
12              Justice?

13      A       Since 1992.

14      Q       And what assignments have you held in your role as  
15              a special agent?

16      A       Predominantly narcotics bureau within the  
17              Milwaukee office.

18      Q       And were you working as a special agent with DCI  
19              on August 13 of 2016?

20      A       I was.

21      Q       And do you recall what occurred on that day, and  
22              can you tell the jury what your assignment was  
23              that particular day and subsequently as it relates  
24              to events from the 13th of August?

25      A       On that particular day, there was an

1 officer-involved shooting with the Milwaukee  
2 Police Department. I did not have an assignment  
3 that day. I subsequently received assignments  
4 thereafter in the following day.

5 Q And specifically, you were asked to look at video  
6 footage that was captured from body cameras from  
7 Officer Dominique Heaggan-Brown and Officer Ndiva  
8 Malafa; is that correct?

9 A Yes, sir.

10 Q And what kind of background do you have in  
11 examining that type of information?

12 A I've been trained through various avenues in video  
13 analysis, along with having done so on probably 50  
14 to 100 occasions in my career on whether it be  
15 body cameras, squad cameras, noninclusive of  
16 surveillance video.

17 Q And as part of your assignment, are you also  
18 assigned to work cases involving officer-involved  
19 shootings?

20 A I am.

21 Q And specifically did you have the opportunity to  
22 review body camera footage from that incident from  
23 those two respective officers?

24 A I did.

25 Q And you've reviewed that extensively?

1 A Yes, sir.

2 Q And that's been entered into the record already as  
3 Exhibit 42. And you've had the opportunity to --  
4 to look at the State's exhibit both in the video  
5 format but also in the still format; is that  
6 correct?

7 A Yes, sir.

8 Q I'm going to start playing the body camera footage  
9 from Officer Heaggan-Brown, and we're going to  
10 play that all the way through, and then afterwards  
11 I'll ask if you recognize that footage.

12 A Okay.

13 Q Thank you.

14 MR. LINDSAY: For the record, I'm  
15 playing the video file contained within Exhibit  
16 42, which is the body camera footage of Officer  
17 Heaggan-Brown.

18 THE COURT: I can't -- you're going to  
19 have to speak up.

20 MR. CHISHOLM: Oh, sorry.

21 MR. LINDSAY: And I'm playing it in its  
22 entirety.

23 THE COURT: Is there audio that's  
24 attached to it?

25 MR. LINDSAY: There will be audio, and



1 I will be --

2 THE COURT: If you want to use this  
3 microphone here.

4 MR. CHISHOLM: I think we have the  
5 speaker issue worked out.

6 THE COURT: We have that squared away?

7 MR. CHISHOLM: We're all right, Judge,  
8 we do. So we'll begin to play it at this time.

9 (The video was played.)

10 BY MR. CHISHOLM:

11 Q Agent Novak, was that an accurate depiction of the  
12 video that you reviewed?

13 A Yes, it was.

14 Q And you also had an opportunity to review the  
15 video footage from Officer Ndiva Malafa; is that  
16 correct?

17 A Yes, that is.

18 Q I would ask you to take a look at that full speed  
19 all the way through as well, and then I'll ask you  
20 some specific questions about what you were  
21 focused on in your investigation.

22 A Very well.

23 MR. LINDSAY: And I'm playing the body  
24 camera footage for Officer Ndiva Malafa contained  
25 within Exhibit 42 in its entirety starting at the

1 beginning.

2 MR. CHISHOLM: With audio.

3 MR. LINDSAY: With audio.

4 (The video was played.)

5 BY MR. CHISHOLM:

6 Q Agent Novak, is that also an accurate depiction of  
7 the footage that you reviewed as well from Officer  
8 Malafa?

9 A It is.

10 Q Facts have been introduced in this case that there  
11 were two shots fired --

12 THE COURT: Can you speak up --

13 MR. CHISHOLM: I'm sorry.

14 THE COURT: -- please?

15 BY MR. CHISHOLM:

16 Q Facts have been introduced that there were two  
17 shots fired by Officer Heaggan-Brown. Can you  
18 tell us specifically what you were asked to do  
19 with respect to the video footage?

20 A To attempt to view it at whatever speed possible  
21 to determine when shots were fired, at what point  
22 in time, body movements, things of that nature.

23 Q And how do you go about doing that?

24 A Initially real time speed and then slowing it down  
25 until the precise time that you can see a

1 functioning of the weapon. Normally with a  
2 semiauto pistol, you'll see the slide start to go  
3 rearward. Understanding that video is not like a  
4 human eye, where you're not getting as many frames  
5 as the human eye sees at any point in time.  
6 Specifically with these cameras they're 30 frames  
7 per second, and trying to slow it down to the  
8 point in time where you can make a determination  
9 on either seeing a casing ejected from the weapon  
10 or a slide moving rearward.

11 Q And that's what you attempted to do in both of  
12 these cases?

13 A Yes, sir.

14 Q So if I take you now to the footage from Dominique  
15 Heaggan-Brown and I take you initially to frame  
16 289 and walk you up to that point --- so you were  
17 able to -- this is frame 289. And at this point,  
18 this was -- this would be a demonstration that you  
19 were able to review this frame by frame; is that  
20 correct?

21 A Yes, sir.

22 Q And just for the record, what can you observe in  
23 this particular frame?

24 A This is where Officer Brown is still in his squad  
25 just prior to making the approach to the suspect

1 vehicle.

2 Q I'm going to move from frame 289 to frame 534, and  
3 if you would monitor on your screen, I know your  
4 screen doesn't have the greatest resolution. If  
5 it's more helpful to look at the main screen,  
6 that's fine as well.

7 MR. LINDSAY: Stop at what frame?

8 MR. CHISHOLM: 534.

9 (The video was played.)

10 BY MR. CHISHOLM:

11 Q And going from frames 289 to 534, what do you  
12 observe there?

13 A It was when Officer Brown -- Heaggan-Brown was  
14 arriving by the suspect vehicle, had put his squad  
15 into park and was exiting via the driver's door  
16 and going around the front of his squad car.

17 Q If I move from frames 534 to 538, what occurs  
18 there?

19 A He had drawn his duty pistol, was in an east to  
20 southeasterly direction. The subject on the  
21 sidewalk had been previously observed at the side  
22 of the suspect vehicle, the passenger side and had  
23 begun walking away. He is now rounding the front  
24 of the squad car with the suspect vehicle parked,  
25 as looking at this view straight ahead and to the

1 right or to the southeast approximately.

2 Q Thank you. Moving from 538 to frame 545.

3 (The video was played.)

4 BY MR. CHISHOLM:

5 Q Can you describe what occurs in that timeframe?

6 A That's when Mr. Smith initially appears on screen,  
7 on camera view, after he had exited the suspect  
8 vehicle driver's door and began running in a north  
9 to northeast direction around the driver's side of  
10 his vehicle, and Officer Heaggan-Brown appeared to  
11 be as though attempting to approach him at that  
12 point in time.

13 Q If I move from frame 552 to 558.

14 MR. LINDSAY: We're at 547.

15 MR. CHISHOLM: I'm sorry, to 552. Can  
16 we move it to frame 558, please?

17 (The video was played.)

18 BY MR. CHISHOLM:

19 Q Can you describe what's occurred there in those  
20 frames?

21 A At that point, Officer Heaggan-Brown is  
22 essentially in front to the front passenger side  
23 of his squad. Mr. Smith was fleeing in a  
24 northerly direction, and during those few previous  
25 frames, you could see the gun in his hand, which

1           had waved in a south direction and then was coming  
2           back forward.

3       Q     And would it be helpful if we moved that back  
4           again one time, just one frame or two? Then stop  
5           there. Is that what you were describing?

6       A     Yes, sir.

7       Q     Thank you. And that was at 552.

8       A     Correct.

9       Q     We now move it from 558 to 572.

10                           (The video was played.)

11       BY MR. CHISHOLM:

12       Q     Can you describe what you've observed in those  
13           frames?

14       A     Officer Heaggan-Brown began to engage in a foot  
15           pursuit of Mr. Smith. The gun was not visible due  
16           to it being on the right side of Mr. Smith's body,  
17           at that point in time in the camera view off the  
18           lapel pointing in a somewhat downward fashion, and  
19           it appeared as though Officer Heaggan-Brown was  
20           starting to reholster his weapon at that point in  
21           time.

22       Q     Just for the record, there appears that there may  
23           be another person in the screen; is that accurate?

24       A     Yes, sir.

25       Q     And where is that located?

1       A       Directly east but north of the suspect vehicle  
2               that Mr. Smith exited.

3       Q       And before we continue, some of these still frames  
4               appear grainy. What's the word that's used?

5       A       Pixilation of it.

6       Q       Pixilation. Can you explain that process to the  
7               jury?

8       A       Due to the slow motion effect of any video and the  
9               frame rate, it being 30 frames a second, the  
10              slower you play it, the more pixilated it gets,  
11              meaning the pixels get distorted within individual  
12              frames itself. It's not like the human eye where  
13              you can track. It's the quality of the camera and  
14              what field of view it has, et cetera.

15      Q       So when you're playing it at the regular speed,  
16              the -- the camera is able to at least get the  
17              appearance of being clear, but when you -- when  
18              you slow it down to an individual frame, it  
19              becomes grainier; is that correct?

20      A       Yes, sir.

21      Q       And of course the flip side of that is that if --  
22              if the camera is moving around a lot, it -- it  
23              creates sort of a jiggling effect when it's played  
24              at regular speed; is that correct?

25      A       Yes.

1 Q We're at -- go from 572 to frame 690. Again, I  
2 apologize. When I'm going back and forth, I can't  
3 see it on that screen, the actual frame, so  
4 sometimes I have to double-check.

5 (The video was played.)

6 BY MR. CHISHOLM:

7 Q Stopping at 691, frame 691, can you tell what's  
8 occurred in those succeeding frames?

9 A That was when the foot pursuit engaged immediately  
10 north and east around the residence, I believe it  
11 was 3210-3212, duplex, around that corner, and  
12 Mr. Smith's feet, I think the momentum in running,  
13 slid out from underneath him. He slid down onto  
14 his right side and then most of the video is not  
15 clearly observable on Officer Heaggan-Brown's body  
16 camera because of the -- as we talked about the  
17 jutter and the movement, quick pacing and him  
18 running, but then at the end you see Mr. Smith on  
19 his right side on his right buttocks and the gun  
20 underneath his right hand as he's falling down.

21 Q If I now move from frame 691 to 694, can you  
22 describe that, please?

23 A That's where the gun becomes more visible. He  
24 never actually completely was supine on the  
25 ground. When he fell, it was more onto his hip,



1           and he had turned more to an easterly direction  
2           with his body and his face towards the fence, but  
3           the gun you can see underneath his right hand  
4           sticking out from the underside of his right  
5           wrist.

6       Q     If I move from 694 to 697, can you describe what  
7           happens in those three frames?

8       A     That it appeared as though he -- he had begun  
9           movement to his left side to either start to rise,  
10          which ended up being that was the case; he was  
11          starting to rise, and gripping the gun with his  
12          right hand.

13      Q     And what's occurring with Officer Heaggan-Brown in  
14          this frame?

15      A     He is beginning to -- it appears as though he has  
16          redrawn his service pistol as you can see it  
17          coming up into the bottom right corner of the  
18          screen.

19      Q     694 to 697.

20                       MR. LINDSAY: We're on 697.

21                       MR. CHISHOLM: I'm sorry, 697 to 706.

22                       (The video was played.)

23      BY MR. CHISHOLM:

24      Q     And again, can you describe those frames?

25      A     At that point, Mr. Smith had begun to rise again

1 using his left hand. It appeared to be to brace  
2 himself and help pull himself back up from the  
3 ground. Officer Heaggan-Brown had drawn his  
4 service weapon and is now coming to a two-handed  
5 grip in front of his body in the direction of  
6 Mr. Smith.

7 Q 706 to 715.

8 (The video was played.)

9 BY MR. CHISHOLM:

10 Q And can you describe that?

11 A That is when Mr. Smith is rising back to a  
12 semi-standing position but bent at the waist,  
13 still holding on to the fence, and you can see the  
14 gun in his right hand and his head turning back to  
15 look at Officer Heaggan-Brown.

16 Q And Mr. Smith is wearing sunglasses at that point  
17 in time?

18 A It appeared to be, yes.

19 Q From 715 to 719.

20 (The video was played.)

21 BY MR. CHISHOLM:

22 Q Would you please describe that?

23 A That's when he's almost come to a full standing  
24 position and clearly has the gun in his right hand  
25 and is looking directly -- it appears to be

1           directly back at Officer Heaggan-Brown and/or  
2           Officer Malafa.

3       Q     And how are his shoulders oriented in that frame?

4       A     They're essentially at a 90 to Officer  
5           Heaggan-Brown. His right shoulder had bladed, be  
6           turning to his right.

7       Q     From 719 to 720.

8                       (The video was played.)

9       BY MR. CHISHOLM:

10      Q     And can you describe this?

11      A     That would have been the first shot that Officer  
12           Heaggan-Brown fired. You can see the slide, it  
13           moved rearward past the webbing of the hand. The  
14           slide functions forward and reverse on a pistol,  
15           and you can see the slide had moved rearward so  
16           the bullet had already been fired, the first  
17           round, and the gun in Mr. Smith's hands while he's  
18           pretty much in a standing position with his right  
19           arm slightly bent forward.

20      Q     And again, we're going to present evidence on the  
21           functioning of a semiautomatic pistol, but in your  
22           training and experience, this is consistent with  
23           that particular firearm being in operation, being  
24           in cycle right now?

25      A     Yes, sir.

1 Q If we could, I would like to mark frame 720.

2 We've prepared some --

3 I'll show you what's been marked as  
4 Exhibit No. 72. That is a package of stills.  
5 Each still is individually marked with a time --  
6 or a frame stamp, and I would just ask you to look  
7 at Exhibit No. 72 and ask if you recognize the  
8 picture and if you can identify that picture.

9 THE COURT: Wait. So Exhibit 72 is the  
10 entire packet?

11 MR. CHISHOLM: It's the entire packet.

12 THE COURT: So then let's delineate  
13 what page, what page number it is.

14 MR. CHISHOLM: It has a time stamp --  
15 or it has a unique identifier on each page.

16 THE COURT: Okay.

17 MR. CHISHOLM: I'll have him identify  
18 that.

19 THE WITNESS: This is the same as the  
20 still photo up on the monitors right now.

21 BY MR. CHISHOLM:

22 Q And how is that identified on that?

23 A As JPG numbering one hundred seven two zero. The  
24 seven two zero matching up with the frame.

25 Q Thank you.

1 A You're welcome.

2 Q And if you would -- if you would just mark that  
3 particular thing in a clear area as what that  
4 depicts, just in one or two words.

5 A (Complies.)

6 Q And what did you indicate that this frame is?

7 A "Slide rearward."

8 Q Thank you.

9 A You're welcome.

10 MR. CHISHOLM: And, Your Honor, I would  
11 ask that Exhibit No. 72 be admitted to the record  
12 and I will withhold publishing at this time.

13 THE COURT: Any objection?

14 MR. SMITH: No.

15 THE COURT: It will be received, and  
16 that will be the entire packet, correct?

17 MR. CHISHOLM: That is correct.

18 (Exhibit 72 was received.)

19 BY MR. CHISHOLM:

20 Q If I could now advance one frame to frame 721.  
21 What can you see in that frame?

22 A That's where Officer Heaggan-Brown's gun was  
23 finishing its recoil upward, and Mr. Smith appears  
24 to have the weapon by the barrel in his right hand  
25 and moving in an upward fashion.

1 MR. CHISHOLM: I have a demonstrative  
2 exhibit here. If the Court would like me to have  
3 that marked, I could do so, however, I don't know  
4 if --

5 THE COURT: It's not going to be  
6 entered into evidence. It would be demonstrative  
7 so it's up to you for the defense. Do you want it  
8 marked?

9 MR. SMITH: No.

10 THE COURT: Okay.

11 MR. CHISHOLM: Thank you.

12 BY MR. CHISHOLM:

13 Q Agent Novak, you recognize these types of items?

14 A I do. They're red guns, training guns.

15 Q These are training guns and they're made to at  
16 least resemble in general form the firearms that  
17 the police officers use or may encounter?

18 MR. KOHN: Your Honor.

19 A JUROR: We can't see.

20 THE COURT: I'm sorry. Yeah, let's  
21 move it a little farther. Can you see over there  
22 or do you need to move it a little closer?

23 A JUROR: Yes.

24 THE WITNESS: That's correct.

25 BY MR. CHISHOLM:

1 Q Thank you. If you could just demonstrate, even if  
2 perhaps stepping away from the stand for a moment,  
3 and just demonstrate how that gun is being held by  
4 Mr. Smith at this time.

5 A Like this. That particular weapon had an extended  
6 magazine on it, so that's why you see the extra  
7 length coming off the magazine well, it's longer.  
8 Holding it like this and moving it in a upward  
9 fashion.

10 THE COURT: So the record should  
11 reflect that the agent is holding the weapon by  
12 the barrel with the handle down, basically tossing  
13 it across his body or quasi across his shoulder,  
14 not across his entire body. Would that be an  
15 accurate description?

16 MR. CHISHOLM: It is, Your Honor.

17 THE COURT: And from the defense?

18 MR. SMITH: Yes.

19 THE COURT: All right. Thank you.

20 MR. CHISHOLM: Thank you.

21 BY MR. CHISHOLM:

22 Q Now, you mentioned this extended magazine. Is  
23 that a unique feature of this particular weapon  
24 that's being observed?

25 A Unique to have that in the weapon, yes.

1 Q And not unique, but -- well, let me just ask this  
2 question. What is an extended magazine?

3 A A normal magazine holds, depending on the caliber  
4 or the type of weapon, a certain number of rounds.  
5 An extended magazine is nothing but a lengthened  
6 magazine to hold additional rounds. So instead of  
7 10, this one I believe held 28 or 30, if I recall  
8 correctly.

9 Q So I'm going to show you what's already been  
10 marked as Exhibit 41 and Exhibit 64, and if you  
11 could just describe those two exhibits and if  
12 that's -- if that's a way of demonstrating what  
13 we're talking about here.

14 A Yes, it is. The one in the plastic bag is a  
15 normal magazine capacity. This in -- that's loose  
16 and not in the bag would be the extended magazine  
17 that holds more ammunition, but it stays within  
18 the same firearm.

19 Q Those are -- those are legal, those are  
20 commercially available; is that correct?

21 A Yes, they are.

22 Q Thank you. Now, typically if a firearm were --  
23 I'll strike that. I'll approach that later.

24 I would like to go back to the frame  
25 analysis. We're at frame 721. Before we go



1 further again, there's one thing that I would just  
2 like to draw your attention to and ask if it has  
3 any relevance of your assessment of the timing.  
4 And again, looking at Exhibit [sic] 721, there's  
5 also a fence post; is that correct? Can you see  
6 that on your screen?

7 A Yeah, yes.

8 Q And there appears to be a vertical black metal  
9 strip right there as well?

10 A Correct.

11 Q And if we were to slide backwards several frames.

12 MR. LINDSAY: I'm reversing from 721  
13 back to 717.

14 BY MR. CHISHOLM:

15 Q Now, if you look at 717, what condition is that --  
16 is that metal frame in at that time?

17 A It's essentially vertical.

18 Q And that would have been prior to the discharge of  
19 the first round?

20 A Yes, sir.

21 Q And now if we move back again to 721.

22 MR. LINDSAY: I'm advancing back to  
23 722.

24 BY MR. CHISHOLM:

25 Q And what can you see here?

1       A       It appears as though it's bent or deformed at that  
2       point in time.

3       Q       And do you observe anything with respect to  
4       Mr. Smith's right arm, bicep area?

5       A       With the pixilation it's hard to make a positive  
6       determination, but it appears as though you can  
7       see the wound through his bicep area of his right  
8       arm.

9       Q       If we move from 722 up one frame to 723, can you  
10      describe that?

11      A       That's where Mr. Smith is still turned in a  
12      westerly direction with his head mostly towards  
13      Officer Heaggan-Brown, and his right arm is  
14      continued upward and over the fence with the  
15      firearm, and it appears as though that's at the  
16      moment in time or just prior to releasing a hold  
17      on the gun that Mr. Smith had.

18      Q       723 to 724, can you describe what happens in that  
19      frame?

20      A       That's where he released the gun. He was tossing  
21      it in an easterly direction.

22      Q       From 723 to 724 -- 724 to 730.

23                       (The video was played.)

24      BY MR. CHISHOLM:

25      Q       Can you describe that?

1       A       He had -- you can see the gun traveling in an  
2               easterly direction and he had bladed his body now  
3               away from with his head turned towards the east  
4               and was starting to make a downward rearward  
5               movement with his body.

6       Q       730 to 754.

7                       (The video was played.)

8       BY MR. CHISHOLM:

9       Q       And can you describe those frames?

10      A       That was where he fell to his backside onto his  
11              back in a prone, somewhat supine position with his  
12              head facing to the north, northwest slightly  
13              closest to the adjoining residence wall and his  
14              feet coming up over the top of him. Over his  
15              torso.

16      Q       Thank you. And are his -- is any portion of his  
17              upper body, arms, torso, head visible at that  
18              time?

19      A       Only part of his -- his left arm. His right arm  
20              is not visible.

21      Q       Thank you. 754 to 759.

22                       (The video was played.)

23      BY MR. CHISHOLM:

24      Q       You can you describe that movement?

25      A       You're starting to see his feet come further over

1 the top of his torso almost in line with his head.  
2 The soles of his shoes are visible and his feet  
3 are upward, and his right arm now starts to become  
4 visible at least from the forearm/elbow to bicep  
5 area slightly, but the hand is not in the -- the  
6 left arm appears to be near his head.

7 Q And that right arm, does that appear to be on the  
8 pavement, on the sidewalk at that time?

9 A It appears to be close, yes, flat on the walk  
10 area.

11 Q From 759 to 771.

12 (The video was played.)

13 BY MR. CHISHOLM:

14 Q Can you describe what's occurred there?

15 A His motion -- or his movement is still continuing  
16 with his body very fluidly, and his right leg  
17 comes all the way over the top of his head, almost  
18 on a horizontal plane past his head and his right  
19 arm a similar position, and that frame 771, it  
20 appears a second shot was fired as the slide  
21 appeared to have moved rearward on the weapon.

22 Q If I could -- if I showed you again Exhibit No.  
23 72, do you recognize the still photograph in 771?

24 A I do. It depicts what is on the monitors  
25 currently.

1 Q And again, would you be willing to mark just in a  
2 few short words what's occurring in this slide,  
3 the most significant thing?

4 A Sure.

5 MR. CHISHOLM: Judge, there's a  
6 question from the juror.

7 THE COURT: I'm sorry?

8 JUROR NO. 11: I didn't hear, did you  
9 say the second shot was fired now, right now in  
10 771?

11 MR. CHISHOLM: Do you want me to reask  
12 the question?

13 THE COURT: Why don't we clarify that.  
14 Normally we don't have questions, but if you  
15 didn't hear it I need to have it --

16 JUROR NO. 11: Yeah.

17 THE COURT: -- I need to have it  
18 replayed. Do you want to -- let's have the court  
19 reporter read it back since it's -- I don't want  
20 to have to have that altered.

21 (Answer read.)

22 JUROR NO. 11: Thank you.

23 THE COURT: And just so we're clear,  
24 you're Juror No.?

25 JUROR NO. 11: Huh?

1 THE COURT: Juror No.?

2 JUROR NO. 11: 11.

3 THE COURT: Thank you.

4 BY MR. CHISHOLM:

5 Q Did you have an opportunity to annotate this  
6 particular frame?

7 A I did.

8 Q And it indicates that you are stating that this  
9 says what?

10 A "Slide rearward, second shot."

11 Q Thank you.

12 A You're welcome.

13 Q Now, again, I would ask you just to step away from  
14 the stand for just a moment, go to the larger  
15 screen, and is there anything else in this picture  
16 that -- that confirms that a shot has been fired?

17 A Based upon -- and it's pixilated -- but as you  
18 watch the frames as they progress, the webbing --  
19 the hand slide nor ally sits equal distance to the  
20 weapon, and when the slide goes rearward as the  
21 shot's fired, the cycle of the weapon chambers a  
22 new round, and will move backward towards the  
23 wrist, which appears to be the case here, and  
24 there's movement upward of the weapon, which is  
25 the recoil of the weapon after a shot is fired.

1 Q And do you recognize this object right here as  
2 well?

3 A It appears to be the casing coming out from the  
4 weapon itself after it was ejected when the slide  
5 started to move rearward.

6 Q And if we could, could we just move back a couple  
7 frames and move forward?

8 MR. LINDSAY: Moving in reverse from  
9 frame 771 back several frames. Frame 768. And  
10 then advancing again to 771.

11 (The video was played.)

12 BY MR. CHISHOLM:

13 Q Having seen that again, are you confident that  
14 that's what's occurring here?

15 A I am. The casing appears then after it's ejected  
16 from the weapon.

17 Q Thank you.

18 A You're welcome.

19 Q So if we now move from 771 to frame 800.

20 (The video was played.)

21 MR. LINDSAY: I advanced to 804.

22 BY MR. CHISHOLM:

23 Q We moved from 771 to 804. Can you describe what  
24 occurs during those frames?

25 A You can see the weapon finish its recoil upward

1           and come back to a settled -- what we call a  
2           settled position with the two-handed grip, and  
3           Officer Heaggan-Brown tracking the subject while  
4           he's down as his feet went back in a southeasterly  
5           direction and then came back over the top again  
6           off to the side.

7       Q     Frame 802 or 801 up to 835.

8                       MR. LINDSAY: We're at frame 804  
9           advancing to 835.

10                      (The video was played.)

11   BY MR. CHISHOLM:

12   Q     And again, can you describe that movement?

13   A     Just prior to 804 you could see Officer  
14           Heaggan-Brown. Officer Heaggan-Brown's left hand  
15           go towards his upper lapel area where his lapel  
16           mic for his portable radio is located. It appears  
17           as though that's a transmission that he was going  
18           to make after firing the second round, and then he  
19           comes back down with his left hand to do a  
20           two-handed grip on his firearm.

21   Q     From 835 to 915.

22                      (The video was played.)

23   BY MR. CHISHOLM:

24   Q     And can you describe those frames, please?

25   A     He again took his left hand off the weapon. I



1           should have also clarified on that previous series  
2           of frames that that also could have been him  
3           activating his body camera because I believe the  
4           activation buttons are located on the center of  
5           the chest. This one or the previous was that  
6           along with most likely a radio transmission that  
7           he was attempting to do at that point in time.

8       Q       I'd move from 835 to 915.

9                       MR. LINDSAY: We're at 915.

10      BY MR. CHISHOLM:

11      Q       I'm sorry, 915 to 1035.

12                       (The video was played.)

13      BY MR. CHISHOLM:

14      Q       Can you describe what occurs there?

15      A       Officer Brown -- Officer Heaggan-Brown continues  
16           to cover Mr. Smith with his firearm as Mr. Smith's  
17           body becomes relaxed, his arms start to go down  
18           towards his body, his legs curl over to the side,  
19           and his left hand at that point goes down towards  
20           his left waistband pocket area, and you can see  
21           the visible wound in his right arm at that point  
22           in time.

23      Q       From 1035 to 1061.

24                       (The video was played.)

25      BY MR. CHISHOLM:

1 Q Can you describe that?

2 A That is when his hand continued down towards the  
3 waist/left pocket area, and Officer Heaggan-Brown  
4 then reaches down and clears his hand from that  
5 waistband/pocket area.

6 Q From 1061 to 1124.

7 (The video was played.)

8 BY MR. CHISHOLM:

9 Q Describe that, please.

10 A That is where he removed Mr. Smith's hand from the  
11 waistband area and moved it up towards his head  
12 and again reached down to what appeared to be  
13 clearing his hand from his waistband/pocket area.

14 Q And then from 1124 to 1225.

15 (The video was played.)

16 BY MR. CHISHOLM:

17 Q Can you describe that? Can you describe that  
18 timeframe?

19 A That was during -- matching up with during the  
20 real time playing when Officer Heaggan-Brown was  
21 getting stung by a bee or bees at that point in  
22 time, and he almost transitioned his weapon into  
23 his left hand and was looking down at his -- and  
24 extending his left arm.

25 Q Then we'll do one more, and that is from 1225 to

1 1384.

2 (The video was played.)

3 BY MR. CHISHOLM:

4 Q And again, can you just describe those frames?

5 A That was during the course in time when Officer  
6 Heaggan-Brown was stung by the bees and also was  
7 calling out to his partner, Officer Malafa, and  
8 they were radioing in about the officer-involved  
9 shooting and things of that nature.

10 Q Thank you. Having looked at all of those frames,  
11 you then attempted, based on the frames per  
12 second, to come up with a timeframe from the first  
13 shot to the second shot; is that correct?

14 A Yes, I did.

15 Q Can you describe how you did that and what  
16 conclusion you came to?

17 A I did a frame count from the earliest point in  
18 time that I could make a determination that the  
19 weapon had been fired, between viewing Officer  
20 Heaggan-Brown's body camera and Officer Malafa's  
21 body camera, and I did a frame count from the  
22 first movement of the firearm until the second  
23 movement of the firearm, which were indicative of  
24 shots being fired, and I came up with an  
25 approximation of 1.69 seconds.

1 Q Thank you.

2 A You're welcome.

3 Q And what I would like now to do is switch back  
4 over to Officer Malafa's body camera and just --  
5 focus just on -- on that same timeframe just so  
6 that you can review that process, but we'll just  
7 go right to that specific timeframe, from the  
8 first shot to second shot.

9 A Okay.

10 MR. LINDSAY: And I'm now opening the  
11 MP4 file containing the body camera footage of  
12 Officer Malafa. And I'm advancing it to frame  
13 313.

14 MR. CHISHOLM: If we could advance from  
15 313 to 324, please.

16 (The video was played.)

17 BY MR. CHISHOLM:

18 Q Can you describe what occurs in those frames?

19 A In the very first few frames you could see the  
20 weapon and Mr. Smith's hand as he's falling to the  
21 ground. Officer Heaggan-Brown appears to keep his  
22 thumb near the thumb break or his holster with his  
23 -- the rest of his fingers on his right hand near  
24 the mag well, and he also has his left hand  
25 towards his duty belt area.

1 Q And would that be consistent where his taser is  
2 located as well?

3 A Yes, it would be.

4 Q If I move from 324 to 325 frame, can you describe  
5 what occurs there?

6 A It appears as though he's starting to grip his  
7 firearm with his fingers curled underneath the  
8 magazine well backstrap area of the pistol.

9 Q And what is Officer Malafa doing at this time, if  
10 you can infer from this picture?

11 A It appears as though he's actually radioing or  
12 transmitting on his lapel mic.

13 Q If I go from 325 to 335 --

14 (The video was played.)

15 BY MR. CHISHOLM:

16 Q -- can you describe that?

17 A That was when Officer Heaggan-Brown actually drew  
18 his service pistol with that previous frame  
19 showing him gripping the mag well area and  
20 backstrap of the weapon and then clearing the  
21 holster and coming out to the two-handed hold.

22 Q If I go from 335 to 342 --

23 (The video was played.)

24 BY MR. CHISHOLM:

25 Q -- can you describe that?

1       A       Mr. Smith had fallen, and this is when he reached  
2               up with his left hand and was bracing himself,  
3               helping himself back up onto his feet, and you can  
4               see the weapon visible underneath his right hand.

5       Q       324 to 345.

6                       (The video was played.)

7                       THE WITNESS: That is where he is  
8               becoming more vertical coming to a standing  
9               position, and the weapon is clearly visible in his  
10              right hand with his head turning back towards  
11              Officer Heaggan-Brown.

12      BY MR. CHISHOLM:

13      Q       And 345 up to 352.

14                       (The video was played.)

15                       MR. LINDSAY: I advanced to 353 and  
16               then I reversed one frame to 352.

17      BY MR. CHISHOLM:

18      Q       And can you describe that, please?

19      A       That is where Mr. Smith rose with the firearm, had  
20               his head turned in the direction of Officer  
21               Heaggan-Brown, and it appears the slide has now  
22               begun its rearward movement on the -- on Officer  
23               Heaggan-Brown's duty pistol.

24      Q       Take you to one slide to 353. You previously  
25               identified that as the approximate time you

1 believe what happened?

2 A When the first shot was fired.

3 Q Thank you.

4 MR. CHISHOLM: Your Honor, I'm going to  
5 approach the witness with Exhibit 71. It is  
6 similar to Exhibit No. 72. It contains still  
7 photographs of Officer Malafa's camera.

8 BY MR. CHISHOLM:

9 Q I'll show you Exhibit No. 71 and just ask you if  
10 you can identify that exhibit.

11 A Yes, these are still photos of Officer Malafa's  
12 body camera.

13 Q And again, could you go to the frame that we've  
14 identified as frame 353?

15 A That matches up with the still frame on the  
16 monitors.

17 Q And again, would you be willing to annotate that  
18 particular still shot just by indicating briefly  
19 what is occurring there?

20 A (Complies.)

21 Q Can you state what you've written there?

22 A "First shot, slide rearward."

23 Q Thank you. Now, if we could, I would like to  
24 advance from 353 -- from 353 to 379.

25 (The video was played.)

1 BY MR. CHISHOLM:

2 Q Can you describe what occurs there?

3 A That's after the first round had been fired.  
4 Mr. Smith had thrown the gun in an easterly  
5 direction over the fence and began his downward  
6 movement falling back downward.

7 Q And can we advance to frame 380, please?

8 (The video was played.)

9 BY MR. CHISHOLM:

10 Q And again, can you describe that frame?

11 A That is where Mr. Smith was on his back and his  
12 hands now making a movement up towards his head  
13 area.

14 Q Advancing to frame 395.

15 (The video was played.)

16 BY MR. CHISHOLM:

17 Q Can you describe what's occurred there?

18 A That was similar to Officer Heaggan-Brown's video  
19 before. In this fashion you can see more clearly  
20 his hands and arms rising up towards the area of  
21 his head with his feet coming up over the top and  
22 with his soles upward.

23 Q And from 395 to 405.

24 (The video was played.)

25 THE WITNESS: That is where the feet



1 continued movement upward, and at this point in  
2 time, it appears that the slide is moving rearward  
3 on Officer Heaggan-Brown's firearm.

4 BY MR. CHISHOLM:

5 Q And that would be consistent with the second shot?

6 A Correct.

7 Q Thank you. And I'll do the same thing. I'll just  
8 move to frame 405 and show you Exhibit 71 and just  
9 ask if you would mark that exhibit.

10 A (Complies.)

11 Q Thank you. Can you identify the exhibit that you  
12 marked?

13 A Frame No. 405, which matches up with the still  
14 frame on the monitors, and I indicated by "second  
15 shot, slide rear."

16 Q Thank you.

17 A You're welcome.

18 MR. CHISHOLM: Your Honor, I would ask  
19 that Exhibit 70 [sic] also be entered into the  
20 record.

21 THE COURT: Any objection?

22 MR. CHISHOLM: I'm sorry, it's  
23 Exhibit 71.

24 THE COURT: 71.

25 MR. SMITH: No, sir.

1 THE COURT: It will be received.

2 (Exhibit 71 was received.)

3 BY MR. CHISHOLM:

4 Q Agent Novak, I would also like you to -- we're  
5 going to move the frame on Officer Malafa's body  
6 camera back to a point in time prior to the  
7 shooting, and were you able to make an estimation  
8 of the period from when Officer Heaggan-Brown  
9 first fully grabs his pistol until when he fires  
10 his first shot?

11 A Yes.

12 Q And again, you use the same process that you've  
13 used from first shot to second shot to look at  
14 that timeframe as well?

15 A Correct.

16 MR. LINDSAY: And I'm moving the still  
17 frame to frame 325.

18 BY MR. CHISHOLM:

19 Q So again, I think you've previously identified  
20 this particular frame, and now if I move forward  
21 to frame 353, and you recognize frame 353 as  
22 having been previously marked as where the first  
23 shot is fired on this camera?

24 A Yes.

25 Q And using that information, were you able to come

1 up with an estimate of the time using the same  
2 method that you used before?

3 A I did.

4 Q And what did you conclude?

5 A A little less than a second, approximately.

6 MR. CHISHOLM: May we have a side-bar?

7 THE COURT: Okay.

8 (An off-the-record side-bar was held.)

9 THE COURT: Is that a hand up?

10 THE BAILIFF: Jo Jo's got it.

11 THE COURT: All right. We're going to  
12 take a 10-minute break now and then we should  
13 finish up by noon with a handful of things that we  
14 have planned, get you to lunch, and then we'll  
15 continue on at 1:30.

16 THE BAILIFF: All rise for the jury.

17 (The jury left the courtroom.)

18 THE BAILIFF: You may be seated. Court  
19 is still in session.

20 THE COURT: Okay. Let's take our  
21 10-minute break. It's my understanding that there  
22 are going to be some transcripts that are going to  
23 be handed out. I have to get the instruction that  
24 I will read to the jury. It's my understanding  
25 it's about 16 minutes, so that by the time we get

1           them back in the box, do the instruction, play  
2           that, it should bring us right up to around 12:00.  
3           We'll then reconvene -- if you want, maybe we can  
4           reconvene at 1:15, get everyone back up here so  
5           that we actually get into the courtroom and get  
6           going at 1:30. Then we'll do some publication of  
7           certain photos, and then we'll move along. Will  
8           that work?

9                     MR. SMITH: Sure.

10                    MR. CHISHOLM: Yes, Your Honor.

11                    THE COURT: You might as well answer  
12           because you don't get that chance too often.

13                    MR. KOHN: The only concern we have at  
14           1:15, Your Honor, is we normally try to remove  
15           ourselves from this complex.

16                    THE COURT: When I say 1:15, I'm  
17           actually more like getting the jury up here and  
18           getting everybody ready to go so that we can start  
19           right at 1:30, so that when you come up we're  
20           ready to go.

21                    MR. KOHN: Thank you.

22                    THE COURT: So that's fine. Thank you.  
23           We're in recess for 10 minutes.

24                             (Witness stepped down.)

25                             (Recess taken from 11:26 a.m. until

1 11:49 a.m.)

2 THE BAILIFF: All rise for the jury.

3 (The jury entered the courtroom.)

4 THE BAILIFF: You may be seated.

5 THE COURT: All right. We're going  
6 to -- we have about a 16-minute recording of audio  
7 and video, I believe, or is it just audio?

8 MR. LINDSAY: Your Honor, the State is  
9 going to play the video portion of Officer  
10 Heaggan-Brown's body camera footage with audio,  
11 and a transcript has been prepared and labeled  
12 Exhibit No. 43. It's been provided to the defense  
13 and I have a copy for the Court as well, and I  
14 will be playing the footage within the MP4 file in  
15 its entirety.

16 THE COURT: All right. And so we can  
17 pass -- do we have the transcripts?

18 MR. LINDSAY: I've given them to your  
19 deputy, and he'll be handing them out, Your Honor.

20 THE COURT: Okay. While we're handing  
21 them out, I just have a very quick instruction for  
22 you with regard to this.

23 You are about to hear an audio  
24 recording with an audio -- well, actually view an  
25 audio visual recording. Recordings are proper

1 evidence and you may consider them just as any  
2 other evidence. Listen carefully, some parts may  
3 be hard to understand.

4 You'll be provided with a transcript to  
5 help you listen to the recording. If you notice  
6 any difference between what you heard on the  
7 recording and what you read in the transcript, you  
8 must rely on what you heard and not what you read.

9 All right. And then with regard to the  
10 defense, there is a stipulation that the  
11 transcript is reasonably accurate?

12 MR. SMITH: I believe best efforts have  
13 been made in that regard by the State.

14 THE COURT: Right, and I guess that's  
15 the best we can hope for. There are no glaring  
16 errors; is that correct?

17 MR. SMITH: Not that I've identified,  
18 correct.

19 THE COURT: Okay. Thank you.

20 MR. LINDSAY: And I'm beginning the  
21 recording, Your Honor.

22 THE COURT: All right.

23 (The video was played.)

24 MR. LINDSAY: I'm sorry, Judge.

25 THE COURT: We have no audio. Try it

1           again, I guess.

2                   MR. LINDSAY: Your Honor, can I have --  
3           we have an individual here that will help us make  
4           sure this works.

5                   THE COURT: Let's do that quickly.  
6           Okay.

7                   (The video was played.)

8                   THE COURT: Okay. That will be the  
9           extent of the morning's session. The -- one of  
10          the bailiffs will pick up the transcripts. Have a  
11          good lunch. We'll start up at 1:30.

12                  THE BAILIFF: All rise for the jury.

13                  (The jury left the courtroom.)

14                  MR. KOHN: Side-bar?

15                  THE COURT: Sure.

16                  (An off-the-record side-bar was held.)

17                  THE BAILIFF: You may be seated.

18                  THE COURT: All right. See everyone  
19          right at 1:30. All right. We're in recess until  
20          1:30.

21                  (Noon recess.)

22                  (Proceedings adjourned at 12:12 p.m.)  
23  
24  
25

1       STATE OF WISCONSIN       )  
2                                       ) ss.  
3       MILWAUKEE COUNTY       )  
4  
5

6                                       I, LAURELL L. BRESLOW-COLLIEN,  
7       Official Court Reporter in and for the Circuit Court of  
8       Milwaukee County, do hereby certify that the foregoing  
9       is a true and correct transcript of all the proceedings  
10      had in the above-entitled matter as the same are  
11      contained in my original machine shorthand notes on the  
12      said trial or proceedings.

13  
14      Dated at Milwaukee, Wisconsin on October 23, 2017.  
15  
16  
17  
18  
19

20      \_\_\_\_\_  
21      Electronically signed by:  
22      LAURELL L. BRESLOW-COLLIEN, RPR  
23      OFFICIAL COURT REPORTER  
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